

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SONJA KAYE DOWNTON,

Plaintiff,

vs.

MICHAEL J. ASTRUE, COMMISSIONER
OF THE SOCIAL SECURITY
ADMINISTRATION,

Defendant.

CASE NO. 08cv2154 DMS (CAB)

**ORDER (1) DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND (2)
GRANTING DEFENDANT'S
CROSS-MOTION FOR
SUMMARY JUDGMENT**

[Docket Nos. 15, 16]

Plaintiff Sonja Kaye Downton (“Plaintiff”) moves for reversal or remand. Defendant Michael J. Astrue, in his capacity as Commissioner of the Social Security Administration, opposes Plaintiff’s motion and cross-moves for summary judgment. Plaintiff did not file an opposition to Defendant’s motion or a reply to Defendant’s opposition. In her motion, Plaintiff argues the Administrative Law Judge (“ALJ”) erred in (1) rejecting the testimony of Plaintiff’s mother and daughter regarding the severity of her condition, (2) failing to ask the vocational expert (“VE”) whether his testimony was consistent with the Dictionary of Occupational Titles (“DOT”), and (3) rejecting the opinion of one of Plaintiff’s treating physicians. Plaintiff also asserts the ALJ’s reasons for discrediting her allegations of pain were legally insufficient, and the ALJ failed to develop the record. For the reasons discussed below, the Court denies Plaintiff’s motion for reversal or remand, and grants Defendant’s cross-motion for summary judgment.

I.

BACKGROUND

3 Plaintiff is a 51-year-old female with a high school education. (Administrative Record (“AR”)
4 at 75, 145.) On October 29, 2003, Plaintiff filed an application for Social Security disability benefits,
5 alleging a disability onset date of October 15, 2002. (*Id.* at 34.) Plaintiff alleged she was disabled due
6 to thyroid disease, high blood pressure, chronic obstructive pulmonary disease (“COPD”), back and
7 leg pain, cramps, muscle spasms and foot pain. (*Id.* at 139.) In conjunction with Plaintiff’s
8 application, her mother, Laura Williams, submitted a “Function Report Adult - Third Party.” (*Id.* at
9 172-80.) In that report, Ms. Williams stated Plaintiff’s daily activities included taking medicine,
10 eating, watching television, and cleaning as much as physically possible. (*Id.* at 172.) The Social
11 Security Administration denied Plaintiff’s application for disability benefits on April 29, 2004. (*Id.*
12 at 409-14.)

13 On June 1, 2004, Plaintiff filed an appeal of that denial, alleging additional problems with her
14 intestines, as well as glaucoma. (*Id.* at 162-68.) In conjunction with her appeal, Plaintiff submitted
15 a form entitled “Medical Source Statement of Physical and/or Mental Work-Related Impairments” that
16 was completed by one of her treating physicians, Daljeet Singh, M.D. (*Id.* at 322-26.) In that form,
17 Dr. Singh diagnosed Plaintiff with degenerative joint disease, gastroesophageal reflux disease
18 (“GERD”), hypertension and irritable bowel syndrome. (*Id.* at 322.) He also provided his opinion
19 about Plaintiff’s physical and mental abilities in light of these impairments. (*Id.* at 323-26.)

20 On May 3, 2006, ALJ Joyce Craig held a hearing on Plaintiff's appeal. (*Id.* at 26-31.)
21 Attorney Joan Deans represented Plaintiff at the hearing. (*Id.* at 26.) ALJ Craig also called a medical
22 expert, Dr. Stephen Sulavik. (*Id.*) The hearing was brief and ultimately was continued to allow the
23 medical expert to review all of the medical records.

24 Subsequent to that hearing, Plaintiff moved to San Diego from her previous residence of
25 Higginsville, Missouri. (*Id.* at 98.) In accordance with that move, the Social Security Administration
26 transferred Plaintiff's file to its San Diego office. (*Id.* at 99.)

27 On November 13, 2006, ALJ Leland Spencer resumed the hearing on Plaintiff's appeal. (*Id.*
28 at 32.) Plaintiff was not represented by counsel at that hearing. Plaintiff testified that she suffered

1 from COPD, high blood pressure, thyroid disease, degenerative joint disease, arthritis, depression and
 2 anxiety. (*Id.* at 39-40.) The ALJ also heard testimony from Plaintiff's daughter, Carla Conaway, and
 3 VE Mark Remas. (*Id.* at 32.)

4 On May 22, 2007, ALJ Edward Steinman issued a written decision denying Plaintiff disability
 5 benefits. (*Id.* at 18-25.) In reaching his decision that Plaintiff was not disabled, the ALJ employed
 6 the five-step sequential process to evaluate Plaintiff's application for disability benefits. 20 C.F.R.
 7 §§ 404.1520 (b)-(f).¹ At step one, the ALJ found that the Plaintiff had not engaged in any substantial
 8 gainful activity at any time relevant to the decision. (AR at 20.) At step two, the ALJ found that
 9 Plaintiff had the following severe impairments: "chronic obstructive pulmonary disease (COPD),
 10 degenerative joint disease, degenerative disc disease, chronic pain disorder, depression NOS, and
 11 somatoform disorder." (*Id.*) At step three, the ALJ determined that the Plaintiff "does not have an
 12 impairment or combination of impairments that meets or medically equals one of the listed
 13 impairments[.]" (*Id.* at 21.) The ALJ found that Plaintiff retains the residual functional capacity to
 14 perform "light work, in a clean air environment, involving simple repetitive tasks, with limited contact
 15 with peers or supervisors." (*Id.*) At step four, the ALJ concluded that Plaintiff could not return to any
 16 past relevant work as a nurse assistant, dry cleaning attendant, or cashier II. (*Id.* at 23.) At step five,
 17 based on Plaintiff's age, education, work experience, and residual functioning capacity, the ALJ
 18 concluded that Plaintiff could perform other work existing in significant numbers in the national
 19 economy; and thus, Plaintiff was not disabled. (*Id.*)

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23 ¹ To determine whether a plaintiff is disabled, the SSA regulations provide a five-step
 24 sequential process. The five steps of the inquiry are (1) Is the plaintiff presently working in a
 25 substantially gainful activity? If so, then the plaintiff is not disabled within the meaning of the Social
 26 Security Act. If not, proceed to step two. (2) Is the plaintiff's impairment severe? If so, proceed to
 27 step three. If not, then the plaintiff is not disabled. (3) Does the impairment "meet or equal" one of
 28 a list of specific impairments described in 20 C.F.R. Part 220, Appendix 1? If so, then the plaintiff
 is disabled. If not, proceed to step four. (4) Is the plaintiff able to do any work that he or she has
 done in the past? If so, then the plaintiff is not disabled. If not, proceed to step five. (5) Is the
 plaintiff able to do any other work? If so, then the plaintiff is not disabled. If not, then the plaintiff
 is disabled. *Bustamante v. Massanari*, 262 F.3d 949, 953 (9th Cir. 2001). The plaintiff maintains the
 burden of proof for steps one through four. However, should an inquiry proceed to step five, the
 burden then shifts to the Commissioner.

1 Plaintiff requested a review of the ALJ's decision. (*Id.* at 14.) The Appeals Council denied
 2 Plaintiff's request for review on September 24, 2008. (*See id.* at 7-9.) Plaintiff filed the present case
 3 on November 20, 2008.

4 **II.**

5 **DISCUSSION**

6 Plaintiff argues the ALJ erred (1) in rejecting the testimony of Plaintiff's mother and daughter
 7 regarding the severity of Plaintiff's condition, (2) in failing to ask the VE whether his testimony was
 8 consistent with the DOT, (3) in rejecting the opinions of Dr. Singh, (4) in failing to provide legally
 9 sufficient reasons for discrediting Plaintiff's allegations of pain, and (5) in failing to develop the
 10 record. Defendant disputes each of these arguments.

11 **A. Legal Standard**

12 Under the Social Security Act, "disability" is defined as the:

13 inability to engage in any substantial gainful activity by reason of any medically
 14 determinable physical or mental impairment which can be expected to result in
 15 death or which has lasted or can be expected to last for a continuous period of
 16 not less than twelve months.

17 42 U.S.C. § 423(d)(1)(A). The impairment must be so severe that the claimant "is not only unable to
 18 do his previous work but cannot . . . engage in any other kind of substantial gainful work." 42 U.S.C.
 19 § 423(d)(2)(A). In addition, the impairment must result "from anatomical, physiological, or
 20 psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory
 21 techniques." 42 U.S.C. § 423(d)(3).

22 A court cannot set aside a denial of benefits unless the Commissioner's findings are based
 23 upon legal error or are not supported by substantial evidence in the record as a whole. 42 U.S.C. §
 24 405(g); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989); *Martinez v. Heckler*, 807 F.2d 771,
 25 772 (9th Cir. 1986); *Taylor v. Heckler*, 765 F.2d 872, 875 (9th Cir. 1985). Substantial evidence is
 26 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
Richardson v. Perales, 402 U.S. 389, 401 (1971); *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995).
 27 It is more than a scintilla but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
 28 n. 10 (9th Cir. 1975).

1 To determine whether substantial evidence exists to support the ALJ's decision, a court
 2 reviews the record as a whole, not just the evidence supporting the decision of the ALJ. *Walker v.*
 3 *Matthews*, 546 F.2d 814, 818 (9th Cir. 1976). A court may not affirm the Commissioner's decision
 4 simply by isolating a specific quantum of supporting evidence. *Hammock v. Bowen*, 879 F.2d 498,
 5 501 (9th Cir. 1989). In short, a court must weigh the evidence that supports the Commissioner's
 6 conclusions and that which does not. *Martinez*, 807 F.2d at 772.

7 If there is substantial evidence to support the decision of the ALJ, the decision must be upheld
 8 even when there is evidence on the other side, *Hall v. Secretary*, 602 F.2d 1372, 1374 (9th Cir. 1979),
 9 and even when the evidence is susceptible to more than one rational interpretation. *Gallant v.*
 10 *Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984). If supported by substantial evidence, the findings of
 11 the Commissioner as to any fact will be conclusive. 42 U.S.C. § 405(g); *Vidal v. Harris*, 637 F.2d
 12 710, 712 (9th Cir. 1981).

13 **B. Lay Witness Testimony**

14 Plaintiff's first argument is the ALJ erred in failing to assess the testimony of her daughter,
 15 Carla Conaway, and in failing to review the written statement submitted by her mother, Laura
 16 Williams. Defendant does not dispute that the ALJ failed to do either of these things, but he argues
 17 to the extent this was erroneous, it was harmless.

18 The Ninth Circuit has stated "the ALJ is required to account for all lay witness testimony in
 19 the discussion of his or her findings." *Robbins v. Social Security Administration*, 466 F.3d 880, 885
 20 (9th Cir. 2006) (citing *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)). However, an ALJ's failure
 21 to do so is subject to harmless error analysis. Under that analysis, "'a reviewing court cannot consider
 22 the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the
 23 testimony, could have reached a different disability determination.'" *Id.* (quoting *Stout v.*
 24 *Commissioner*, 454 F.3d 1050, 1056 (9th Cir. 2006)).

25 Here, Ms. Conaway offered limited testimony at Plaintiff's hearing. When asked if she wanted
 26 to add anything, she stated:

27 It's just been tough since we've been here. We're just trying to get, you know, a place
 28 of our own. Actually been staying with relatives and stuff like that, so - - and just
 seeing her in pain and different things she's going through with everything, it's just
 been hard. But we're, you know we're trying to ... make it, and everything.

1 (AR at 49-50.) Ms. Williams did not testify at Plaintiff's hearing, but she did submit a written report
 2 in support of Plaintiff's application for benefits. (*Id.* at 172-80.) In that report, Ms. Williams provides
 3 information about Plaintiff's daily activities, including her personal care, meals, house and yard work,
 4 transportation, shopping, and social activities, as well as her physical and mental abilities. (*Id.* at 172-
 5 78.)

6 This Court is confident that even if a reasonable ALJ fully credited this testimony, the result
 7 of Plaintiff's application would be the same. Neither Ms. Conaway's testimony nor the report
 8 provided by Ms. Williams establish conclusively that Plaintiff is disabled. As discussed more fully
 9 below, there was ample evidence in the record to support the opposite finding. Accordingly, the
 10 ALJ's failure to discuss the testimony or Ms. Conaway and Ms. Williams does not entitle Plaintiff to
 11 reversal or remand of the ALJ's decision.

12 **C. VE Testimony**

13 Next, Plaintiff argues that she is entitled to reversal or remand based on the ALJ's failure to
 14 comply with Social Security Ruling 00-4p. Specifically, she asserts the ALJ failed to ask the VE
 15 whether his testimony was consistent with the DOT.

16 Social Security Ruling 00-4p states: "At the hearings level, as part of the adjudicator's duty
 17 to fully develop the record, the adjudicator will inquire, on the record, as to whether or not" the VE's
 18 testimony is consistent with the DOT. SSR 00-4p. In this case, ALJ Spencer asked the VE whether
 19 "the testimony that you provide will be based on the DOT and related documents unless you tell me
 20 otherwise?" Defendant argues this satisfied the ALJ's duty to inquire pursuant to SSR 00-4p.
 21 However, the Court disagrees. Asking the VE if his testimony is based on the DOT is not the same
 22 as asking if his testimony is consistent with the DOT. Thus, the ALJ did not comply with SSR 00-4p.

23 Nevertheless, the ALJ's failure to comply with SSR 00-4p is subject to harmless error analysis.
 24 See *Massachi v. Astrue*, 486 F.3d 1149, 1154 n.19 (9th Cir. 2007). In *Massachi*, the court stated that
 25 the ALJ's "procedural error" in failing to ask the VE whether her testimony conflicted with the DOT
 26 "could have been harmless, were there no conflict, or if the vocational expert had provided sufficient
 27 support for her conclusion so as to justify any potential conflicts[.]" *Id.*

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1 Here, Plaintiff argues there was a conflict between the VE's testimony and the DOT in that the
 2 ALJ limited Plaintiff to simple, repetitive tasks, but the jobs identified by the VE require Plaintiff to
 3 perform a combination of tasks. However, this argument misses the mark. The issue is not whether
 4 the jobs identified by the VE are consistent with the ALJ's determination of Plaintiff's residual
 5 functional capacity. Rather, the issue is whether the VE's testimony is consistent with the DOT, and
 6 on that issue, Plaintiff has failed to show any inconsistency. In the absence thereof, the ALJ's failure
 7 to comply with SSR 00-4p was harmless.

8 **D. Treating Physician Opinion**

9 Next, Plaintiff argues the ALJ erred in rejecting the opinions of one of her treating physicians,
 10 Dr. Singh. Specifically, she asserts the ALJ failed to provide specific and legitimate reasons for
 11 rejecting Dr. Singh's opinion that she was only capable of less than full-time work.

12 Although the opinion of the treating physician is usually given deference, “[t]he opinion of the
 13 treating physician is not necessarily conclusive as to either the physical condition or the ultimate issue
 14 of disability.” *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If
 15 there is conflicting medical evidence, the Commissioner must resolve the conflict. *Thomas v.*
 16 *Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
 17 1992). When the opinion of an treating doctor is contradicted by an examining physician, the ALJ
 18 may reject the opinion of the treating physician if the ALJ provides “specific, legitimate reasons for
 19 doing so that are based on substantial evidence in the record.” *Magallanes*, 881 F.2d at 751. “The
 20 ALJ can meet this burden by setting out a detailed and thorough summary of the facts and conflicting
 21 clinical evidence, stating his interpretation thereof, and making findings.” *Magallanes*, 881 F.2d at
 22 751 (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)).

23 In this case, Dr. Singh's opinion was inconsistent with findings of the state agency physicians,
 24 Sandra M. Eriks, M.D. and Michael McManus, M.D., both of whom examined Plaintiff. Accordingly,
 25 the ALJ was required to provide, specific, legitimate reasons supported by substantial evidence in the
 26 record for rejecting Dr. Singh's opinion. In his written decision, the ALJ provided several reasons.
 27 First, he noted that Dr. Singh was not a specialist. (AR at 22.) Second, the ALJ stated Dr. Singh's
 28 opinions were “conclusory” and “excessive in scope and degree[.]” (*Id.*) Third, the ALJ stated that

1 Dr. Singh's opinions "exceed even the claimant's own hearing testimony as to her alleged limitations."
 2 (*Id.*) Fourth, the ALJ noted that "Dr. Singh merely filled out a checklist form supplied by former
 3 counsel, and stated, with regard to the Listing of Impairments, that the claimant meets 'all of them.'" "
 4 (*Id.*) Finally, the ALJ stated Dr. Singh's opinion was not supported by any "ongoing objective
 5 abnormalities in the record[.]" (*Id.*)

6 Plaintiff takes issue with reasons (1), (2) and (4), but each of those reasons was specific and
 7 legitimate. *See Amax Coal Co. v. Franklin*, 957 F.2d 355, 259 (7th Cir. 1992) (finding opinion of
 8 specialist entitled to more weight than opinion of treating physician); *Batson v. Commissioner of*
Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004) (finding no error in ALJ's decision
 10 to give minimal weight to treating physicians' opinions that were in form of checklist, conclusory and
 11 brief). Furthermore, Plaintiff does not challenge reasons (3) and (5), both of which are also specific,
 12 legitimate, and supported by substantial evidence. For instance, Dr. Singh reported that Plaintiff's
 13 ability to understand, remember and carry out job instructions of any kind was "poor," (AR at 326),
 14 but Plaintiff reported that she did not have any difficulties in following written or verbal instructions.
 15 (*Id.* at 193.) In addition, although Plaintiff complained of disabling back pain, (*id.* at 209), the x-ray
 16 of her lumbar spine showed "[n]o evidence of acute fracture or spodylolisthesis[.]" (*Id.* at 234.)

17 In light of the above, the ALJ met his burden to provide specific, legitimate reasons based on
 18 substantial evidence from the record for discrediting Dr. Singh's opinion. Accordingly, this argument
 19 does not entitle Plaintiff to reversal or remand.

20 **E. Claimant Testimony**

21 Next, Plaintiff argues the ALJ's reasons for discrediting her testimony were legally
 22 insufficient. "Generally, 'questions of credibility and resolution of conflicts in the testimony are
 23 functions solely' for the agency." *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007), *cert. denied*, ____
 24 U.S. ___, 128 S.Ct. 1068 (2008), (quoting *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982)).
 25 In a case such as this, where the ALJ rejects the claimant's subjective testimony, the ALJ must provide
 26 "clear and convincing reasons" for doing so, "by specifically identifying 'what testimony is not
 27 credible and what evidence undermines the claimant's complaints.'" *Id.* (quoting *Lester v. Chater*,
 28 81 F.3d 821, 834 (9th Cir. 1995)).

1 Here, the ALJ met that standard. (*See* AR at 23.) Specifically, he provided numerous reasons
 2 for rejecting Plaintiff's statements concerning "the intensity, duration and limiting effects of" her
 3 symptoms. First, the ALJ found Plaintiff's statements were "without objective record support." (*Id.*)
 4 Plaintiff asserts this reason is inconsistent with the ALJ's finding that she suffered from a somatoform
 5 disorder. However, this was not the only reason offered by the ALJ in rejecting Plaintiff's subjective
 6 complaints. He also found that (1) Plaintiff's impairments were "controlled with treatment and
 7 medication," (2) Plaintiff "made inconsistent complaints and statements to her physicians," (3)
 8 Plaintiff had not "undergone ongoing mental health treatment[,] and (4) Plaintiff remained "capable
 9 of significant activities if [sic] daily living." (*Id.*) Plaintiff does not dispute that there was evidence
 10 in the record to support each of these reasons, all of which satisfied the ALJ's burden to provide "clear
 11 and convincing" reasons for rejecting Plaintiff's credibility. *See, e.g., Morgan*, 169 F.3d at 600
 12 (stating when a claimant "is able to spend a substantial part of his day engaged in pursuits involving
 13 the performance of physical functions that are transferable to a work setting, a specific finding as to
 14 this fact may be sufficient to discredit a claimant's allegations.") Accordingly, the ALJ's treatment
 15 of Plaintiff's credibility is supported by substantial evidence, and is free from legal error. It does not
 16 warrant a reversal or remand.

17 **F. Record Development**

18 Plaintiff's final argument in support of her motion is that the ALJ failed in his duty to fully
 19 develop the record. Specifically, Plaintiff asserts that the ALJ failed to provide a medical expert at
 20 Plaintiff's second hearing, which deprived Plaintiff of a full and fair hearing. As Defendant points
 21 out, however, Plaintiff fails to cite any authority that the ALJ is required to provide a medical expert
 22 at the hearing. In the absence thereof, this argument does not warrant reversal or remand.

23 **VI.**

24 **CONCLUSION**

25 For the reasons discussed above, Plaintiff's motion for reversal and/or remand is **DENIED**.

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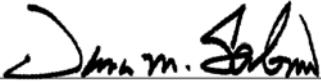
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1 Defendant's cross-motion for summary judgment is **GRANTED**, and the decision of the ALJ is
2 **AFFIRMED**. The Clerk shall enter judgment accordingly, and terminate this case.

3 **IT IS SO ORDERED.**

4 DATED: November 4, 2009

5 
6 HON. DANA M. SABRAW
7 United States District Judge

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